Trusjadi Holdings Sdn Bhd v Waris Selesa Sdn Bhd (in liquidation)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S(02) (NCVC) (W)-1137–6 OF 2016
ABDUL RAHMAN SEBLI, KAMARDIN HASHIM AND HARMINDAR SINGH JJCA
11 OCTOBER 2018

Limitation — Specific performance — Agreement for sale of land — Respondent file action for declaration that sale and purchase agreement valid and enforceable — Trial judge found in favour of respondent — Whether learned trial judge erred in relying on item 112 to the Schedule of the Limitation Ordinance Sabah Cap 72 ('the Limitation Ordinance') — Whether items 92 and 95 of Schedule applicable — Whether failure of appellant to plead item 92 disentitled appellant to rely on the item — Whether respondent's claims time-barred by virtue of item 92 of the Schedule and s 3 of the Limitation Ordinance — Limitation Ordinance Sabah (Cap 72) s 3 — Schedule to Limitation Ordinance Sabah (Cap 72) items 92, 95 & 112

The respondent and the appellant had entered into a sale and purchase agreement ('the SPA') of a land owned by the appellant located at Jalan Lahad Datu, Kunak, Tawau Sabah ('the subject land'). The appellant was to deliver vacant possession of the subject land to the respondent upon payment of the full purchase price ie on 4 February 2005, but the appellant had failed to do so. Further to that, the parties had also created a sublease for a period of 70 years on the subject land. Due to the failure of the appellant to deliver the vacant possession of the subject land, the respondent had filed Suit 86 for a declaration that the SPA was valid and enforceable. In addition, the respondent also filed Suit 113 for a declaration that the sublease agreement dated 5 July 2005 entered into between the appellant and the respondent in respect of the subject land was null and void. In defence of Suit 86, the appellant pleaded that the respondent's claim to enforce the SPA was barred by item 95 of the Schedule ('the Schedule') to the Limitation Ordinance Sabah (Cap 72) ('the Limitation Ordinance'). The learned judge disagreed with the appellant and held that the applicable item was item 112 of the Schedule and not item 95, as such, limitation had not set in. The learned judge had therefore allowed the respondent's claim. Aggrieved by the decision, the appellant filed the present appeal. In opposing the appeal, the respondent submitted, inter alia, that the appellant was not entitled to rely on item 92 of the Schedule as it was not pleaded. The issue raised in the present appeal was that, based on s 3 of the Limitation Ordinance, the respondent's claims were caught by the limitation and should have been dismissed by the learned trial judge.

Held, allowing the appeal with costs subject to payment of allocator fee and setting aside the order of the High Court:

(1) The reliance on item 112 of the Schedule by the learned judge was misconceived because item 112 was only applicable to a claim for adverse possession. The respondent's claim in Suit 86 was for breach of the SPA and/or specific performance of the SPA and not for adverse possession of the subject land. This took the claim outside the scope of item 112 of the Schedule. It was item 92 and/or item 95 of the Schedule that were applicable (see paras 20 & 23–25).

(2) The appellant's failure to plead item 92 did not disentitled it from relying on the said item as it was clear on the agreed facts that the respondent's claim was for breach of contract and/or specific performance, and not for adverse possession of the subject land. Facts that were agreed had the same value and weight as facts that were proved after a full trial. In addition, what was mandatorily required by the proviso to s 3 of the Limitation Ordinance was for the defence of limitation to be set up by the appellant if he intended to rely on it, which the appellant had done in the present case. The proviso did not say that the appellant ought to plead the particular item that he intended to rely on (see paras 32 & 36–38).

(3) By virtue of item 92 of the Schedule, the three-year limitation period for the respondent to claim for specific performance of the SPA began to run from 4 February 2005, which was the date when the appellant allegedly breached the SPA by failing to transfer the land to the respondent as agreed. By the time the respondent filed Suit 86 and Suit 113 in October 2015, it was clearly out of time. The learned trial judge should have dismissed the respondent's claims by virtue of s 3 of the Limitation Ordinance (see paras 40–41).

[Bahasa Malaysia summary

Responden dan perayu telah memasuki perjanjian jual beli ('PJB') sebidang tanah yang dimiliki oleh perayu terletak di Jalan Lahad Datu, Kunak, Tawau, Sabah ('tanah subjek'). Perayu perlu menyerahkan milikan kosong tanah subjek itu kepada responden setelah pembayaran harga belian penuh iaitu pada 4 Februari 2005, tetapi perayu telah gagal berbuat demikian. Lanjutan daripada itu, pihak-pihak juga telah mewujudkan pajakan kecil untuk tempoh 70 tahun atas tanah subjek itu. Akibat kegagalan perayu untuk menyerahkan milikan kosong tanah subjek itu, responden telah memfailkan Guaman 86 untuk deklarasi bahawa PJB tersebut adalah sah dan boleh dikuatkuasakan. Selain itu, responden juga memfailkan Guaman 113 untuk deklarasi bahawa perjanjian pajakan kecil bertarikh 5 Julai 2005 yang dimasuki antara perayu dan responden berkaitan tanah subjek itu adalah terbatal dan tidak sah. Dalam pembelaan Guaman 86, perayu mempli bahawa tuntutan responden untuk menguatkuasakan PJB itu telah dihadkan oleh butiran 95 Jadual ('Jadual

tersebut') kepada Ordinan Had Masa Sabah (Bab 72) ('Ordinan Had Masa'). Hakim yang bijaksana tidak bersetuju dengan perayu dan memutusakan bahawa butiran yang terpakai adalah butiran 112 Jadual tersebut dan bukan butiran 95, oleh itu had masa belum luput. Hakim yang bijaksana dengan itu telah membenarkan tuntutan responden. Terkilan dengan keputusan itu, perayu telah memfailkan rayuan ini. Rayuan tersebut telah dibantah oleh responden yang berhujah, antara lain, bahawa perayu tidak berhak untuk bergantung kepada butiran 92 Jadual tersebut kerana ia tidak dipli. Isu yang timbul dalam rayuan ini adalah bahawa, berdasarkan s 3 Ordinan Had Masa, tuntutan responden terikat dengan had masa dan patut ditolak oleh hakim perbicaraan yang bijaksana.

Diputuskan, membenarkan rayuan dengan kos tertakluk kepada bayaran fi alokatur dan mengetepikan perintah Mahkamah Tinggi:

(1) Kebergantungan pada butiran 112 Jadual tersebut oleh hakim yang bijaksana telah disalah tanggap kerana butiran 112 hanya terpakai kepada tuntutan untuk milikan bertentangan. Tuntutan responden dalam Guaman 86 adalah untuk pelanggaran PJB tersebut dan/atau pelaksanaan spesifik PJB tersebut dan bukan untuk milikan bertentangan tanah subjek itu. Ini menunjukkan tuntutan itu di luar skop butiran 112 Jadual tersebut. Butiran 95 dan/atau butiran 95 Jadual tersebut yang terpakai (lihat perenggan 20 & 23–25).

(2) Kegagalan perayu untuk mempli butiran 92 tidak menafikan haknya untuk bergantung kepada butiran tersebut kerana ia jelas berdasarkan fakta yang dipersetujui bahawa tuntutan responden adalah untuk pelanggaran kontrak dan/atau pelaksanaan spesifik, dan bukan untuk milikan bertentangan tanah subjek itu. Fakta yang dipersetujui mempunyai nilai dan beban yang sama sepertimana fakta yang telah dibuktikan selepas perbicaraan penuh. Selain itu, apa yang dikehendaki secara mandatori oleh proviso kepada s 3 Ordinan Had Masa adalah untuk pembelaan had masa dimasukkan oleh perayu jika dia berniat untuk bergantung kepadanya, yang mana perayu telah lakukan dalam kes ini. Proviso itu tidak menyatakan agar perayu patut mempli butiran tertentu yang diniatkannya untuk bergantung kepadanya (lihat perenggan 32 & 36–38).

(3) Menurut butiran 92 Jadual tersebut, tempoh had masa tiga tahun untuk responden menuntut pelaksanaan spesifik PJB tersebut bermula dari 4 Februari 2005, yang merupakan tarikh apabila perayu dikatakan telah melanggar PJB tersebut kerana gagal memindah milik tanah tersebut kepada responden sepertimana dipersetujui. Apabila responden memfailkan Guaman 86 dan Guaman 113 pada Oktober 2015, ia jelas di luar had masa. Hakim bicara yang bijaksana sepatutnya telah menolak

A tuntutan responden menurut s 3 Ordinan Had Masa (lihat perenggan 40–41).]

Notes

For cases on agreement for sale of land, see 9 *Mallal's Digest* (5th Ed, 2018 B Reissue) paras 2714–2715.

Cases referred to

Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases [1983] 2 MLJ 227, FC (refd)

C *Muhamad Solleh bin Saarani & Anor v Norruhadi bin Omar & Ors* [2010] 9 MLJ 603, HC (refd)

Narinder Kaur v Deyoh bin Opong & Ors [1997] MLJU 169; [1997] 2 CLJ 895, HC (refd)

Nasri v Mesah [1971] 1 MLJ 32, FC (refd)

D *Ong Ah Bee v Hii Chung Siong, Robin* [1993] 1 CLJ 504, HC (refd)

Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609; [2015] 2 CLJ 1037, FC (refd)

Legislation referred to

E Limitation Act 1953 s 6(1)(a)

Limitation Ordinance 1953 (FMS Cap 18) (repealed by Limitation Act 1953) s 9(1)

Limitation Ordinance Sabah (Cap 72) s 3, Schedule, items 92, 94, 95, 112

F **Appeal from**: Suit Nos BKI-22NCVC-86/10 of 2014 and BKI-22NCVC-113/10 of 2015 (High Court, Kota Kinabalu)

Victor Chong (Poh & Victor Chong) for the appellant.

Chin Yuen Fong (Chee & Co) for the respondent.

G *Arthur Bonnie (Wilson Chang with him) (Tan, Arthur Bonnie & Partners) for the intervener.*

Abdul Rahman Sebli JCA (delivering judgment of the court):

H **[1]** We had, after hearing arguments by both sides, unanimously allowed the appellant's appeal and set aside the decision of the High Court on the ground that limitation had set in against the respondent. The appellant was the defendant and the respondent the plaintiff at the trial. These are the full grounds of our decision.

I

[2] This appeal arose from two consolidated suits. The first was Suit No BKI-22NCVC-86/10 of 2014 ('Suit 86') whilst the second was Suit No BKI- 22NCVC-113/10 of 2015 ('Suit 113'). In Suit 86 the respondent's claim against the appellant was for the following reliefs:

(a) that the sale and purchase agreement dated 19 February 2004 ('the SPA') in respect of property held under Country Lease No 245334570 measuring approximately 694.10 acres more or less located off KM37, Jalan Lahad Datu, Kunak, Tawau Sabah ('the subject land') was valid and enforceable between the parties, namely the appellant and the respondent;

(b) that the appellant was holding the subject land as bare trustee pending transfer of the subject land to the respondent; and

(c) the respondent was the legal and beneficial owner of the subject land.

[3] As for Suit 113, the respondent's claim was for a declaration that the sublease agreement dated 5 July 2005 entered into between the appellant and the respondent in respect of the subject land was null and void.

[4] The agreed facts in Suit 86 are as follows:

(a) the respondent was at all material times a company registered in Malaysia and having its registered office at Lot 17, MDLD 3282, Block 2, 1st Floor, Fajar Centre, Lahad Datu, Sabah, Malaysia;

(b) the respondent was wound up pursuant to a winding up order dated 13 June 2014 wherein one Dato' Chong Kwong Chin c/o Ismail Chong & Assoc of No 8A, Jalan Semantan Satu, Damansara Heights, Kuala Lumpur was appointed as the liquidator for the respondent;

(c) the appellant was the majority shareholder of the respondent;

(d) pursuant to the SPA, the appellant agreed to sell the subject land to the respondent; and

(e) the salient terms and conditions of the SPA were, inter alia:

(i) the purchase price for the subject land was RM6,169,000;

(ii) the purchase price was to be paid in kind by using 6,169,000 of the respondent's shares of RM1 to the appellant;

(iii) vacant possession of the land was to be delivered to the respondent upon payment of the purchase price of RM6,169,000;

(iv) the respondent through its advocate's letter dated 30 July 2014 wrote to the directors of the respondent to enquire about the transfer of the subject land; and

(v) the directors of the respondent through Messrs Skrine duly responded to the respondent's advocate's aforesaid letter vide letter dated 2 September 2014.

[5] With regard to Suit 113, these are the agreed facts:

(a) the respondent was at all material times a company registered in Malaysia and having its registered office at Lot 17, MDLD 3282, Block 2, 1st Floor, Fajar Centre, Lahad Datu, Sabah, Malaysia;

(b) the respondent was wound up pursuant to a winding up order dated 13 June 2014 wherein one Dato' Chong Kwong Chin c/o Ismail Chong & Assoc of No 8A, Jalan Semantan Satu, Damansara Heights, Kuala Lumpur was appointed as the liquidator for the respondent;

(c) the appellant (the first defendant in the High Court) was at all material times a company incorporated under the laws of Malaysia with its registered address at the Multi-Services (S) Sdn Bhd, Lot Nos 224 and 225, 1st Floor, Wisma Sabah, Kota Kinabalu, Sabah, Malaysia;

(d) the appellant was at all material times the majority shareholder of the respondent holding 6,169,000 of the total of 6,269,000 shares of the respondent;

(e) on or around 19 February 2004, the respondent entered into the SPA with the appellant wherein the appellant agreed to sell the subject land for RM6,169,000 subject to other terms of the agreement; and

(f) a sub lease for a period of 70 years with effect from 1 May 2004–30 April 2074 by the appellant in favour of the respondent was created on the subject land and registered under Memo No 30319575 dated 5 July 2005.

[6] At the conclusion of the trial, the learned trial judge allowed the respondent's claims, hence the present appeal by the appellant.

[7] One of the issues raised by the appellant in the court below and pursued before us was that the respondent's claim(s) was caught by limitation and should have been dismissed by the learned trial judge. Reliance was placed on s 3 of the Limitation Ordinance Sabah (Cap 72) ('the Limitation Ordinance') which provides as follows:

> Subject to sections 4 to 24, every suit instituted after the period of limitation prescribed therefor by the Schedule shall be dismissed:
>
> Provided that limitation has been set up as a defence.

[8] The appellant had pleaded by para 7 of its statement of defence in Suit 86 that the respondent's claim to enforce the SPA was barred by item 95 of the Schedule to the Limitation Ordinance. This item provides that for compensation for the breach of a *contract in writing*, the limitation period is six years from the period when the period of limitation would begin to run against

a suit brought on a similar contract not in writing. A

[9] The subject matter of the respondent's claim in Suit 86 was the SPA, which the respondent claimed was valid and enforceable, whereas the subject matter of the respondent's claim in Suit 113 was the lease agreement, which it claimed was null and void. B

[10] For compensation for the breach of any contract, express or implied, *not in writing* and not specifically provided for in the Schedule, the limitation period prescribed by item 94 is three years, which runs from when the contract is broken, or, where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or, where the breach is continuing, when it ceases. C

[11] In its opening statement, the appellant had also relied on item 92 of the Schedule, which provides that for specific performance of a contract, the limitation period is three years from the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that the performance is refused. In the present case a date had been fixed for the performance of the SPA. D

E

[12] The respondent did not file any statement of reply to the appellant's statement of defence in relation to the issue of limitation. In *Ong Ah Bee v Hii Chung Siong, Robin* [1993] 1 CLJ 504, Steve Shim Lip Kiong J (as he then was) had this is to say on the defence of limitation:

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> Now it has been held that when the defence of limitation is raised, the burden of pleading and proving that the action was brought within the limitation period shifts to the plaintiff. In *Cartledge v E Jopling & Sons Ltd* [1963] 1 All ER 341, Lord Pearce said:
>
> > I agree that when a defendant raises the statute of limitation the initial onus is on the plaintiff to prove that his cause of action occurred within the statutory period. When, however, a plaintiff has proved an accrual of damage within the six years ... the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the cause of action accrued at an earlier date. G

H

[13] Despite being faced with the defence of limitation set up by the appellant, the respondent did not plead why its action was not caught by limitation, nor did it lead any evidence to show how it could escape from the defence of limitation. I

[14] In *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227, the Federal Court held that where it was clear that the defendants were going to rely on limitation and there was

A nothing before the court to suggest that the plaintiff could escape from it, the claim would be struck out.

[15] In *Muhamad Solleh bin Saarani & Anor v Norruhadi bin Omar & Ors* [2010] 9 MLJ 603, VT Singham J in dealing with s 6(1)(a) of the West B Malaysia Limitation Act 1953 correctly, in our view, said:

> This court is of the considered view that the period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed on the ground of equitable consideration. The provisions of s 6(1)(a) of the said Act are C mandatory in nature. This court has no discretion or inherent powers to condone the delay if the action is filed beyond the prescribed statutory period unless the matter is covered by any of the exceptions which is not the case in the present case. Therefore, this court has not only the power but the duty to consider as to whether the action is time barred, and if it is found to be time barred, the court is duty bound to strike out the action. D

[16] The learned trial judge however disagreed with the appellant. In holding that limitation had not set in against the respondent, His Lordship took the view that the applicable item was item 112 and not item 95. Item 112 E provides for a limitation period of twelve years for possession of immovable property or any interest therein not otherwise specially provided for under the Schedule. If this item applies, the respondent's claims would be well within time.

F **[17]** Under this item, time begins to run when the possession of the defendant becomes adverse to the plaintiff. This was how the learned judge dealt with the matter:

> [12] The ultimate relief of the plaintiff in this action is to have the said land G registered in its name especially when it had fulfilled its obligation under the said sale and purchase agreement. It is obvious that the plaintiff is praying for certain declaration on the validity and enforceability of the sale and purchase agreement dated 19 February 2004 as well certain declaration on the validity of the sublease agreement dated 5 July 2005. They do not pray for damages for breach of contract H against the defendant.
>
> [13] Hence it is obvious that item 95 (as pleaded by the defendant) is not applicable to the plaintiff's case. In my opinion the plaintiff's case falls under item 112 of the Limitation Ordinance which provides that the limitation period for the possession of immovable property not otherwise provided for by the Ordinance is 12 years I from the time when possession of the defendant become adverse to the plaintiff.

[18] In so deciding, the learned judge relied on the following passage in the judgment delivered by Gill FCJ (Ong CJ (Malaya) and Ali FCJ concurring) in the Federal Court case of *Nasri v Mesah* [1971] 1 MLJ 32:

> In the present action the plaintiff's prayer was for an order that the defendant do execute a valid and registrable transfer of the land. In other words, he was asking for specific performance of the agreement as in *Ng Moh*'s case [1971] 1 MLJ 32. But what in effect he was seeking to do was to obtain the land by a judgment of the court. It follows, therefore, that whether the action is for specific performance of an agreement for the sale of land or for a declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be 12 years in either case.

[19] The Federal Court in that case was dealing with s 9(1) of the repealed Federation of Malaya Limitation Ordinance 1953 which reads:

> 9(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

[20] We note that this Ordinance does not contain any provision that is even close to item 112 of the Schedule to the Limitation Ordinance. With due respect to the learned trial judge, we must say at the outset that his reliance on item 112 is misconceived. Item 112 is only applicable to a claim for adverse possession: See the *obiter dictum* of Ian HC Chin J in *Narinder Kaur v Deyoh bin Opong & Ors* [1997] MLJU 169; [1997] 2 CLJ 895 (HC) which in our opinion is a correct statement of the law. The item is not intended to cover breach and/or specific performance of a contract in writing, which is covered by items 92 and 95 of the Schedule.

[21] It is important to remember that the respondent's case was that the SPA was valid and enforceable between the parties, and that it was a term of the agreement that vacant possession of the subject land was to be delivered to the respondent upon payment of the purchase price by the appellant.

[22] On the pleadings, it is clear that the respondent's claim in Suit 86 was not for adverse possession of the subject land. Rather, the respondent's claim was for breach of the SPA and/or for specific performance of the agreement. This takes the claim outside the scope of item 112 of the Schedule.

[23] Given the respondent's pleaded case and the evidence before the court, the question of the appellant being in adverse possession of the subject land does not arise for item 112 to be applicable. The mere fact that the respondent in Suit 86 was claiming for a declaration that the SPA was valid and enforceable and that the respondent was the legal and beneficial owner of the subject land does not mean that the appellant was in adverse possession of the land.

[24] For item 112 to apply, the respondent's claim has to be for adverse possession of the subject land and not merely for a declaratory relief that it was

A the legal and beneficial owner of the land and that the appellant was holding the land as bare trustee pending its transfer to the respondent.

[25] *Nasri v Mesah* is therefore irrelevant as it was a case on recovery of land and not on adverse possession of immovable property or any interest therein within the meaning of item 112 of the Schedule. It is item 92 and/or item 95 that are applicable and not item 112. Perhaps this was the reason why learned counsel for the respondent did not even refer to *Nasri v Mesah* at the hearing of this appeal.

[26] The respondent went on to submit that the appellant was not entitled to rely on item 92 as it was not pleaded. It was pointed out that since the wrong item 95 was pleaded by the appellant, its defence of limitation could not be sustained.

[27] The appellant contended otherwise. It was argued that once the defence of limitation had been expressly pleaded, it was entitled to rely on any provision of the Limitation Ordinance to defeat the respondent's claim as the burden was on the respondent in any event to show that its claim was not caught by limitation.

[28] Our view on the matter is that the High Court is empowered to consider any item of the Schedule to the Limitation Ordinance provided limitation has been set up as a defence and the evidence warrants its determination. The learned judge would have been right to apply item 112 (although not pleaded by the respondent) had there been evidence to support its application. There was none in this case.

[29] Reference may be made to the Federal Court case of *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037 where headnote [1] (CLJ) to the report reads as follows:

> [1] The defence of limitation was properly and sufficiently pleaded by the defendant. Even though the Limitation Act 1953 ('LA 53') was not mentioned by name in the defence, it was sufficient for the defendant to aver in the defence that the plaintiff's claim was time-barred according to law. The defendant had also not abandoned the limitation defence. The limitation issue was taken up before the High Court.

[30] In the present case, it is clear that the appellant had put the respondent to sufficient notice of it's intention to rely on limitation by pleading item 95 in its statement of defence and by relying on item 92 in its opening statement, and it had not, at any stage of the hearing, abandoned the defence.

[31] The limitation period for specific performance was clearly an issue before the High Court and the respondent had every opportunity to adduce evidence to defeat the defence but chose not to do so. Instead it chose to argue that item 95 was not applicable as it was not claiming for compensation for breach of contract.

[32] Thus, while it is true that item 92 was not pleaded by the appellant in Suit 86, its failure to plead the item does not disentitle it from relying on the item as it is clear on the agreed facts that the respondent's claim was for breach of contract and/or for specific performance, and not for adverse possession of the subject land. Facts that are agreed have the same value and weight as facts that are proved after a full trial.

[33] To reiterate, although the respondent's claim in Suit 86 was for declaratory reliefs, it was for all intents and purposes a claim for breach of the SPA and to compel its performance by the appellant, ie by transferring the subject land to the respondent, as agreed. This is clear from the following testimony of PW1 during cross-examination:

> Q37: In essence, the claim initiated by you on behalf of the Plaintiff against the Defendant is for the Defendant to complete the Sale and Purchase Agreement ie to transfer the land from the Defendant to the Plaintiff.
>
> A: Correct, as one of my duties as liquidator.

[34] It was PW1's testimony that the appellant was to deliver vacant possession of the subject land to the respondent upon payment of the full purchase price, which was supposed to be on 4 February 2005 when the allotment of the 6,169,000 shares was made. PW1 had further testified that in the event the appellant failed to transfer the subject land by 4 February 2005, it would be in breach of the SPA.

[35] The question whether the appellant's failure to transfer the subject land constituted a breach of the SPA was a question of law for the learned trial judge to determine (and not for any witness of fact), but PW1 was not wrong anyway to suggest that the appellant would be in breach if it did not transfer the land to the respondent by 4 February 2005.

[36] It is important to note that what is mandatorily required by the proviso to s 3 of the Limitation Ordinance is for the defence of limitation to be set up by the defendant if he intends to rely on it, which the appellant had done in the present case.

[37] The proviso does not say that the defendant must plead the particular item or items of the Schedule that he intends to rely on. In the circumstances,

A we were unable to accede to the respondent's argument that since item 92 was not pleaded by the appellant, its defence of limitation could not be sustained.

[38] In our view, so long as the defence of limitation has been set up as required by the proviso to s 3 of the Limitation Ordinance, and the defendant's
B reliance on any item of the Schedule is supported by the evidence, the court is under a duty to consider the defence although not pleaded. As decided by the Federal Court in *Syarikat Kemajuan Timbermine*, it was sufficient for the defendant to aver in the defence that the plaintiff's claim was time-barred according to law.

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[39] In fact in that case the defendant did not even refer to the Limitation Act 1953 in its statement of defence, yet the apex court considered the defence to be available.

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[40] Therefore, by virtue of item 92 of the Schedule, the three-year limitation period for the respondent to claim for specific performance of the SPA began to run from 4 February 2005, which was the date when the appellant allegedly breached the SPA by failing to transfer the land to the
E respondent as agreed.

[41] By the time the respondent filed Suit 86 and Suit 113 in October 2015, it was clearly out of time. Its claims should therefore have been dismissed by the learned trial judge by virtue of s 3 of the Limitation Ordinance.

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[42] It was for all the reasons aforesaid that we allowed the appellant's appeal with costs, subject to payment of the allocator fee. The order of the High Court was set aside. The deposit was refunded to the appellant.

G *Appeal allowed with costs subject to payment of allocator fee; Order of High Court set aside.*

Reported by Dzulqarnain Ab Fatar

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